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No. 03-5165

In The
Supreme Court Of The United States

Marcus Thornton
Petitioner

v.

United States of America
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF SHASHANK S. UPADHYE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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Motion For Leave To File Brief

Amicus is a member in good standing of this Court and moves this Court for leave to file the attached brief in support of neither party. The United States consented but the Petitioner's counsel did not and similarly, did not provide a detailed explanation thereto.

This brief proposes a rule that finally dispenses of the "intent" or "motive" based approach for vehicle searches putatively present under the *Chimel-Belton* doctrines. The motive or intent based approach has been examined by this Court in two prior cases that were never resolved because this Court either dismissed the petition as improvidently granted or dismissed for want of jurisdiction. *Amicus* has a strong interest in preserving the rights granted under the Fourth Amendment and believes that a new zone-based approach is necessary. *Amicus* proposes a new rule that ignores subjective factors and focuses on objective factors; more precisely, the desire to create bright line rules that assist law enforcement officers in performing their duties and protects individual liberties. Given the increasing emphasis placed on law enforcement to ferret out national security threats, subjective inquiries must be abandoned in favor of objective inquiries. *Amicus* has demonstrated a disturbing and pernicious trend toward reducing privacy rights involving automobiles and believes that a more objective based inquiry is necessary. The new test is adequately described in the brief. Finally, as a matter of professional courtesy, a draft of this brief was sent to the Petitioner's counsel weeks before this filing and thus has had ample opportunity to review its substance and thus will not be prejudiced by this brief. Therefore, *amicus* requests the Court grant the leave.

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BRIEF OF SHASHANK S. UPADHYE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

With the consent of the Respondent but without consent of the Petitioner, *amicus curiae,* Shashank S. Upadhye respectfully submits this brief in support of neither party.*

INTEREST OF *AMICUS CURIAE*

Shashank S. Upadhye is a lawyer who also studies the Fourth Amendment search and seizure law with a particular emphasis on the "automobile exception." Through this brief, Mr. Upadhye hopes to persuade this Court to adopt a rule that reflects and reaffirms the standards set forth in *Chimel* instead of adopting rigid rules that emasculate the protections of the Fourth Amendment. Moreover Mr. Upadhye writes to remind the Court that the undisputed rule of the Fourth Amendment is that warrants are required wherever reasonably possible and warrantless searches are the very limited exceptions. Furthermore, Mr. Upadhye writes to dissuade this Court from adopting rules proposed by law enforcement agencies that are couched in terms of "national security" in the post-September 11th aftermath. Because the ultimate relief sought by the parties threatens both the interests of society and poses harm to

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* Counsel of record for the United States consent, but Petitioner's counsel did not. In accordance with this Court's Rule 37.3(b), those letters have been filed with the Clerk.

In accordance with Rule 37.6, *amicus* states that this brief was authored in its entirety by the counsel listed on the cover, and no person or entity other than the *amicus* listed on the cover made a monetary contribution to the preparation or submission of this brief.

the respect for the Bill of Rights, Mr. Upadhye submits this brief.

SUMMARY OF THE ARGUMENT

The question presented is: whether the bright line rule announced in *New York v. Belton*, 435 U.S. 454 (1981) is confined to situations in which the police initiated contact with the occupant while that person is in the vehicle.

Regrettably, the answer is not that simple for via prior cases that went unresolved by this Court, the United States has disguised within this simple question a hidden but frontal attack on *Chimel v. California*, 395 U.S. 752 (1969), and *Belton*. More particularly, the rule professed by the United States further erodes the *Chimel-Belton* rules and furthers the erosion of applicable Fourth Amendment rights. *Belton's* indisputable holding is that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may as contemporaneous incident of that arrest, search the passenger compartment of that automobile. [footnote 3]" *Belton*, 454 U.S. at 460. In footnote 3, the Court took pains to also hold that the *Belton* holding "does no more than determine the meaning of *Chimel's* principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." Accordingly, because the *Belton* rule is predicated on the *Chimel* rule, then the bases of the *Chimel* rule dictate the contours of the *Belton* rule. The issue framed has enormous impact on the resolution of the case. Compare, *Bowers v. Hardwick*, 478 U.S. 186 (1986)(narrowly framed issue) with *Lawrence v. Texas*, 539 U.S. ___ (2003)(overruling *Bowers* on a more expansively framed issue). It is respectfully suggested that the issue as framed is wholly inadequate to the resolution of this case because it only concerns an intent or reason to exit. Rather, the issue for

resolution is: "may officers conduct a warrantless search of a vehicle under *Chimel-Belton* if the arrestee was within a spatial or temporal zone of the vehicle and does it matter whether the arrestee exited the car voluntarily?" See, *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 431 (2002)(discussing merits of addressing questions not squarely presented in petition and certiorari grant).

None of the Supreme Court cases involving vehicle searches made intent or motive an issue in whether the search was permissible. Intent simply did not play a role in vehicle searches. But space and time have, and do, play a significant role in the vehicle cases. After all, the very essence of *Chimel* was a search incident to a lawful arrest in the areas where an arrestee could reach for weapons or destroy evidence. To this end, only regional appellate courts or state supreme courts have layered the intent or motive factor onto the *Chimel-Belton* tests.

As such, the best rule to adopt is one that placates the interests of the law enforcement agencies and the rights of individuals. To this end, this brief suggests that this Court adopt a new rule based on whether the arrestee was within a spatial or temporal zone of the vehicle as mandated by *Chimel-Belton* and ignore the reasons the arrestee exited the car. There are, therefore, four scenarios in the following matrix that defines the permissibility of the search. Column one identifies the reason for the arrestee's exit from the vehicle. Column two identifies whether the arrestee is within the Constitutional spatial or temporal zone and column three identifies whether a Constitutionally permissible search can result. Column four identifies a precedent, if available.

Scenario	Exit Reason	Proximity	Result	Precedent
1	Police Initiated	In-zone	Search	*Chimel* & *Belton*
2	Police Initiated	Outside Zone	No Search	*Belton* maybe & Fourth Amend-ment
3	Voluntary	In-zone	Search	New Rule & *Chimel*
4	Voluntary	Outside Zone	No Search	New Rule *Chimel*, & Fourth Amend-ment

ARGUMENT

I. *Belton* Does Not Extend Beyond The Scope Of *Chimel*, Which Is Strictly Construed.

Belton's holding does not at all suggest that the reason an arrestee exited a vehicle is important. *Belton* held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. [footnote 3]" *Belton*, 454 U.S. at 460. In footnote 3, the Court took pains to also hold that the *Belton* holding "does no more than determine the meaning of *Chimel's* principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to

lawful custodial arrests." *Chimel* provided for warrantless searches incident to a lawful arrest only under certain narrow circumstances. Accordingly, it is indisputable that *Belton* was a further narrowly drawn exception to *Chimel's* already narrow exception. *Chimel*, therefore, as the broader rule dictates the contours of *Belton*. Said another way, *Belton* cannot be broader than *Chimel*.

Now it is true that the Court has stated that "cars are not to be treated identically with houses or apartments for Fourth Amendment purposes." *Rakas v. Illinois*, 439 U.S. 128, 148 (1978). The purpose of that distinction rests in the inherent mobility of the vehicle creating the exigency of flight, *California v. Carney*, 471 U.S. 386, 392-93 (1985), *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996)("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more."); or because there is a reduced expectation of privacy in vehicles given the pervasive governmental regulation of automobiles. *South Dakota v. Opperman*, 428 U.S. 364, 367-68 (1976) ("Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements...The expectation of privacy as to automobiles if further diminished by the obviously public nature of automobile travel."). But see, *Delaware v. Prouse*, 440 U.S. 648, 662 (1979)(a person operating a car "does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation").

Chimel was the first case to sanction the concept of a search incident to a lawful arrest. *Chimel* acknowledged that Court decisions on warrantless searches were far from consistent and acknowledged the difficulty in creating hard and fast rules. *Chimel*, 395 U.S. at 755. *Chimel* recognized, as a matter of First Principles, that the Framers adopted the Fourth Amendment as "a

reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for Independence." *Chimel*, 395 U.S. 761. As a matter of Framer's Intent or early common law at the time of the Fourth Amendment, I found no case expressly discussing the application of the Amendment to horses, buggies, wagons, stage coaches, saddle bags, or other early modes of transportation as opposed to idly speculating what the common law was as the Court did in *Carroll v. United States*, 267 U.S. 132 (1925). See, *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999)("The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed").[1]

Against this backdrop, the *Chimel* court pronounced the twin motives for warrantless searches as incident to a lawful arrest. The first motive was to protect the arresting officer from harm, e.g., to prohibit the arrestee[2] from reaching for a weapon. The second motive was to prevent the destruction or concealment of evidence. *Chimel*, 395 U.S. at 762-63. *Belton* did not add anything more except extend *Chimel* to vehicles. Again, neither *Chimel's* nor *Belton's* holdings suggested that the reason

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[1] See, e.g., 30 Geo. II. Ch. 22, Sec. 5, 13, 22 Stat. 107-108, 111 (1757)(authorizing arrest of people obstructing public streets, lanes or open passages with pipes, butts, barrels, casks, or an empty cart, car, dray, or other carriage); see also, 27 Geo. II, ch. 16, Sec. 7, 21 Stat. 188 (1754)(permitting arrest for negligent carriage drivers).

[2] The term "arrestee" denotes the vehicle occupant who exited the vehicle and was subsequently arrested and convicted based on the evidence obtained in the post-exit search.

the arrestee exited the vehicle was important. *Chimel* did not involve vehicles at all. But what C*himel* and hence *Belton*, did was endorse a zone-based approach.

I.A. *Chimel* Implicitly Adopted A Spatial And Temporal Relationship Theory Tying The Item Searched To The Arrestee.

As to the first motive, *Chimel* went to great pains to discuss "spatial and temporal" relationships incident to a warrantless search. With regard to the spatial relationship of the arrestee to the disputed evidence, the Court noted the gradual progression of the scope of the "space" that could be searched:

- the right was to search the arrestee only, not anything else (*Chimel*, 395 U.S. at 755);

- the permitted "space" morphed into the person or area "in his control" (*Chimel*, 395 U.S. at 755-56; citing to *Carroll v. United States*, 267 U.S. 132, 158 (1925));

- the space then became the area "in the possession or under the control of" the arrestee (*Chimel*, 395 U.S. at 760; citing to *United States v. Rabinowitz*, 339 U.S. 56 (1950));

- the space then became the area in "the offender's *immediate* custody" (*Chimel*, 395 U.S. at 757; citing *Go-Bart Importing v. United States*, 282 U.S. 344, 456 (1931)); and

- the space became "the" place – as opposed to just any place – "where the arrest is made in order to find and seize things connected with the crime as its fruits" (*Chimel*, 395 U.S. at 756; citing to *Agnello v. United States*, 269 U.S. 20, 30 (1925)).

But the underlying and indisputable theme in *Chimel* and the cases cited therein that is consistent with

the first motive was that the space to be searched was either the arrestee himself or the space in his "immediate" or "direct" or "in his control." There is no doubt that regarding the first motive, the *Chimel* rule was that "there is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel*, 395 U.S. at 763.

As such, the most consistent reading of this language is that "reachability" is the key determinant. "Reachability" as a test avoids fictitious, cartoonish, or incredible hypotheses that persons well outside the wingspan or at some distance from the vehicle, could be in theoretical reach of the weapon. According to Merriam Webster's dictionary, "immediate" means "directly touching or concerning a person or thing" or "acting or being without the intervention of another object, cause, or agency." *Belton* also sanctioned reachability as the determinant wherein the Court said that the space to search was the "passenger compartment [if] within reach of the arrestee" *Belton*, 453 U.S. at 460; and "drawers within an arrestee's reach could be searched." *Belton*, 453 U.S. at 461. It follows that reachability is the linchpin of the spatial relationship test for reachability means "an area within the immediate control" of the arrestee.

Confining *Belton* to its facts and narrow rule creates the appropriate rule that where the custodial arrestee is at some distance from his vehicle, or is in custody, then his vehicle is deemed to be at "another place" outside the vicinity of the arrest domain and hence a search is not incident to a lawful arrest. See, *Coolidge v. New Hampshire*, 403 U.S. 443, 457 (1971)("Mr. Justice Black's opinion for a unanimous Court held that 'once an accused is under arrest and in custody, then a search (of his car) made at another place, without a warrant, is simply not incident to the arrest."). See also, *Dyke v. Taylor*

Implement Mfg. Co., 391 U.S. 216, 220-21 (1968)(holding that the search of the vehicle outside the courthouse after the arrestees were well into custody inside the courthouse was too remote in time or place to be incident to a lawful arrest). Moreover, as held in *Chambers v. Maroney*, 399 U.S. 42, 47 (1970), that the "search that produced the incriminating evidence was made at the police station some time after the arrest and cannot be justified as a search incident to an arrest: 'Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.'"[3]

As to the temporal relationship, this factor adjudges how long after the arrestee is in safe custody may the officer then go back and search the vehicle. It is true that once the arrestee is removed in time from his vehicle, the odds of him obtaining the weapon or destroying the evidence significantly decreases. One argument that is oft trumpeted by police is that a warrantless search is necessary at the time because "tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search." *Chambers v. Maroney*, 399 U.S. 42, 51 n. 9 (1970). But if *Chimel's* motives are to hold true, there is no significant likelihood that a *custodial arrestee*

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[3] Notwithstanding that *Chimel* was decided the previous year, the *Chambers* court held that the search was legal because: (a) the contents of the car perhaps would never be found again if the search was delayed while a warrant was sworn out, 399 U.S. at 51; (b) balancing the need for the warrantless search where probable cause existed with the need for a warrant, 399 U.S. at 52; (3) because it was dark outside, a careful search was impractical and perhaps not safe, 399 U.S. at 52 n. 10; and (4) the vehicle owner should be thankful that the police impound the vehicle at the stationhouse, 399 U.S. at 52 n. 10.

can remove instruments or fruits once under custodial arrest.

II. *Chimel* and *Belton* Mandate a Zone-Based Approach That Ignores The Arrestee's Motive For Exiting The Vehicle.

The key consideration, of course, must be on the spatial and temporal relationship of the arrestee to the vehicle at the time of the arrest, not at the time of the search because it is the arrest time where *Chimel* said that officer safety is tantamount. *Chimel*, 395 U.S. at 762-63. To this end, one can postulate a zone around the vehicle, both in time and place, against which the Constitutionality of a search is measured. There are, therefore, four scenarios in the following matrix that can define the Constitutionality permissibility of the search. The precise question on *certiorari* involves the reason for the arrestee's exit. Neither *Chimel* or *Belton* explicitly mentioned whether the warrantless search was permissible based on the reason the arrestee exited. Both cases are silent on the reason, motive, or intent to exit. The parties can point to no explicit language that sufficiently discusses reason, motive, or intent. The new rule proffered now Constitutionally ignores the intent or motive and consequently avoids subjectivity. In essence, arguing over intent creates much ado about nothing.

II.A. Why a Zone-Based Approach is Necessary.

The creation of the spatial and temporal zone is absolutely necessary to provide adequate guidance to law enforcement and to individuals. Without a zone-based approach, there are no limitations to the *Chimel-Belton* rule because there is "as much an arrest 24 hours later, or 48 hours later. There was just as much an arrest as if he had been 3 miles away, or 30 miles away, [and if measuring the operative condition as the time of the arrest, then the police] could search 2 days later and they could search 30 miles away." Transcript of Oral

Argument in *Florida v. Thomas*, Sup. Ct. Docket No. 00-391 (25 April 2001), pg. 6-7. As this statement shows, quite plainly the *Chimel* motives are not implicated at all.

This Court has not shied away from creating, defeating, or upholding spatial and temporal zones. For example, in the so-called abortion bubble zones, this Court sanctioned zones around abortion clinics into which protesters may not venture; see, *Schenck vs. Pro-Choice Network*, 519 U.S. 357 (1997) and *Hill v. Colorado*, 530 U.S. 703 (2000)(upholding zones around clinics); and in residential neighborhoods, *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)(upholding zone around residential neighborhoods for adult-themed bookstores or videostores); but see ostensibly *United States v. Flores-Montano*, Sup. Ct. Docket No. 02-1794, cert. granted (per 19 U.S.C. §1581(a), providing no boundaries and unfettered discretion to Customs officials as the text of statute says, "at any time...at any place in the United States...and search the ... vehicle... and every part thereof...and use all necessary force to compel compliance."). This Court may strike down a statute that permits no boundary limitation and unfettered discretion to the officers. See *United States v. Ortiz*, 422 U.S. 891 (1975)(invalidating traffic checkpoint designed to locate illegal aliens because too far from border, statistical effectiveness unsubstantiated, and too great uncheckable police discretion).

Similarly, the Court approved of temporal zones, such as in the just-decided case of *United States v. Banks*, 540 U.S. ___ (2003)(Sup. Ct. Docket No. 02-473)(upholding 15-20 second period as being adequate time under the "knock and announce" rule). In another area of law, likelihood of confusion to prove trademark infringement includes confusion after the purchase decision. See generally, Shashank S. Upadhye, Trademark Surveys: Identification Of The Relevant Universe Of Consumers Who Must Be Confused, 8

Fordham I.P., Ent. & Media L.J. 550, 564-578 (June 1998)(analyzing spatial and temporal relationships in trademark infringement).

The United States may argue that an expansive temporal zone is permitted under *United States v. Johns*, 469 U.S. 478 (1985), wherein the Court permitted a warrantless search days after the custodial arrest and seizure. There the Court stated that there "is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure." 469 U.S. at 484. In *Johns*, the Court noted, however, that "officers may indefinitely retain possession of a vehicle and its content before they complete a vehicle search." 469 U.S. at 487. But *Johns* stated the basis for searching the vehicle days later was because the probable cause that gave rise to arrest involved the vehicle itself. Moreover, *Johns* stated:

> [W]e do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 523 (1971) (White, J., dissenting). Nor do we foreclose the possibility that the owner of a vehicle or its contents might attempt to prove that delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest. *Cf. United States v. Place*, 462 U.S. 696 (1983).

The plain language of *Johns* therefore limits the temporal zone to those instances in which the vehicle itself gave rise to the probable cause to search and seize. In addition, as discussed below, *Johns* can be reconciled on the basis of a temporary search seizure.

Belton also implicitly noted that searches that occur temporally after the arrest are not permitted as they

"cannot be viewed as incidental to the arrest or as justified by any other exigency." *Belton*, 453 U.S. at 462.

Fundamentally, the zone analysis provides a very workable rule. It avoids asking the embarrassing question to the arresting officer: "After you had handcuffed him and put him in your squad car, what was the particular threat to you or why did you believe that the arrestee could still destroy evidence?" An officer cannot credibly answer that he was in danger or that evidence was destroyed if the arrestee was secured and in custody. It also comports with *Knowles v. Iowa*, 525 U.S. 113, 114 (1998) where this Court also declined to adopt the bright line rule that traffic citations permitted a full-blown scope. In so holding, this Court noted that, "[I]n *Robinson* [*United States v. Robinson*, 414 U.S. 218 (1973)], we held that the authority to conduct a full field search as incident to an arrest was a "bright-line rule," which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern. Here we are asked to extend that "bright-line rule" to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all. We decline to do so." Creating a zone-based approach and ignoring the reasons for exiting comports with the *Knowles* theory that there are circumstances in which plainly officer safety and evidence destruction are no longer implicated.

II.B. Explanation of Scenarios and Outcomes

There are, therefore, four possible scenarios based on the zone-based approach.

Column one identifies the reason for the arrestee's exit from the vehicle. Column two identifies whether the arrestee is within the Constitutional zone at the time of the arrest and column three identifies whether a Constitutionally permissible search can result. Column four identifies a precedent, if available.

Scenario	Exit Reason	Proximity	Result	Precedent
1	Police Initiated	In-zone	Search	*Chimel* & *Belton*
2	Police Initiated	Outside Zone	No Search	*Belton* maybe
3	Voluntary	In-zone	Search	New Rule & *Chimel*
4	Voluntary	Outside Zone	No Search	New Rule

Scenario One is self-explanatory as this is the current rule under *Chimel* and clearly the case under *Belton*. Because the arrestee was within the zone of the vehicle at the time of the search. Both *Chimel* motives are implicated because the arrestee can reach for a weapon and can destroy evidence.

Scenario Two does not permit a search in this case because the *Chimel* motives are not implicated, at the time of the arrest, and it is not clear whether *Belton* holds that the search may take place. Whether *Belton* applies

is precisely the issue in this case and was in *Florida v. Thomas*, 532 U.S. 774, 776 (2001)(dismissing certiorari for want of jurisdiction), and in *Arizona v. Gant*, 202 Ariz. 240 (2002), cert. granted, 2003 WL 1903726 (2003)(certiorari dismissed). This is because when the arrestee is outside the zone, none of the *Chimel* factors can apply, and objectively, the arrestee cannot reach for a weapon nor destroy evidence, and an attempt to do so, would be manifestly unreasonable. See, *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)("the touchstone of the Fourth Amendment is reasonableness"); *Florida v. Royer*, 460 U.S. 491, 506 (1983)(eschewing bright line tests and emphasizing reasonableness inquiry); *Michigan v. Chesternut*, 486 U.S. 567, 572-73 (1988)(rejecting both parties desire for bright line rule in favor of the traditional contextual approach). Accordingly, this search is not allowed because the objectively contextual factors elucidating whether the arrestee was within the zone do not permit a search.

Scenario Three is a narrow rule that satisfies a law enforcement agency's desire to remove voluntariness/police initiation from the *Chimel-Belton* inquiry, but reinforces that the *Chimel* motives must be examined. Under this scenario, a law enforcement agency gets what it wants – that is, the ability to search a quick witted arrestee who "outfoxes" the flat-footed officer by voluntarily exiting the vehicle. Ignoring intent avoids subjective determinations, such as:

(1) whether the arrestee was aware of the police when he got out of the car, a determination that may depend on whether the police are in uniform or a marked squad car, police lights or sirens have been activated, or the arrestee was impaired in a manner that could have affected his awareness of the police; (2) whether, the arrestee appeared to get out of the car voluntarily, the arrestee nevertheless did so to avoid the [*Belton* rule]; and (3) whether an officer sufficiently signaled confrontation with an arrestee while he was in the car,

such that the arrestee got out of the car due to the officer's contact as opposed to another reason. *Amicus* Brief of the United States in *Arizona v. Gant* (Sup. Ct. Docket No. 02-1019), pg. 17.

As such under Scenario Three, officers may search the car, irrespective of the reason of the arrestee's exit because at the time of the arrest, the arrestee was within the *Chimel-Belton* zone.

Scenario Four, like the second, ignores the voluntariness/police initiation subjective inquiry and returns the inquiry's focal point to *Chimel's* twin motives. Here, because the arrestee is outside the zone of the vehicle at the time of the arrest, no warrantless search is permitted.

II.C. Justification For A Zone-Based Approach

These scenarios permit the authorities to:

(a) ignore subjective inquiries into the arrestee's intent in exiting the vehicle (the very issue in *Thomas* and *Gant*);

(b) search a vehicle under the *Chimel-Belton* legal fiction to satisfy practical and doctrinal concerns only insofar that *Chimel*'s undisputed basic twin motives are objectively examined;

(c) search without a warrant in situations that are "strictly tied to and justified by the circumstances which rendered its initiation permissible," *Chimel*, 395 U.S. at 762, *Belton*, 453 U.S. at 457;

(d) obtain the necessary warrant issued by the neutral magistrate in those situations where the Constitution requires it for Fourth Amendment compliance (but see, *Florida v. White*, 526 U.S. 559 (1999)("Fourth Amendment does not require the police to

obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband", and as when the arrestee is outside the zone;

(e) comply, as necessary, with the Constitutionally acceptable requirements of inventory searches, see *Colorado v. Bertine*, 479 U.S. 367 (1987), *South Dakota v. Opperman*, 428 U.S. 364 (1976), or comply with "temporary seizures" while the officers swear out a warrant to search the car, see *Illinois v. McArthur*, 531 U.S. 326 (2001)(permitting officer's to deny entry into arrestee's own home temporarily seizing home whilst other officer's obtain search warrant); *United States v. Place*, 462 U.S. 696, 706 (1983)("we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* [*v. Ohio*, 392 U.S. 1 (1968)] and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope;" (emphasis added); *United States v. Brignoni Ponce*, 422 U.S. 873 (1975)(permitting officer to briefly detain vehicle on suspicion of carrying illegal aliens); *United States v. Flores-Montano*, U.S. Supreme Court Docket No. 02-1794, cert. granted, 14 Oct. 2003 (whether Customs may remove, disassemble vehicle's gas tank during border search); and *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970) (holding 29-hour detention of mailed package reasonable given unavoidable delay in obtaining warrant and minimal nature of intrusion);

(f) obtain consent of the arrestee to search the car, *Florida v. Bostick*, 501 U.S. 429 (1991), *Florida v. Jimeno*, 500 U.S. 248 (1991); and

(g) provide a bright-line rule consistent with *Belton* to provide a "single familiar standard," *Belton*, 453 U.S. at 458-59, and ensure that "responsible Fourth

Amendment balance is not well-served by standards requiring sensitive, case-by-case determinations and government need, less every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater v. City of Lago Visa*, 532 U.S. 318, 347 (2001).

The United States would have this Court rule on the very precise issue of whether voluntariness permits a vehicle search without analyzing whether the *Chimel* twin motives are present. That is, the rule proffered assumes that the *Chimel* motives are satisfied—without any examination if that truly is the case. As such, if adopted, the rule would in effect become: "Officers may search a vehicle, regardless of the reason the arrestee exited the vehicle, at any time thereafter, irrespective of the distance of the arrestee to the vehicle, and irrespective of whether the arrestee could have reasonably obtained a weapon or destroyed evidence." Thus, this further exception to *Chimel-Belton* would in effect swallow the general rule of *Chimel* and its twin motives, thereby emasculating whatever privacy rights anyone had in his person or effects as related to an automobile. See, *Florida v. J.L.*, 529 U.S. 266, 273 (2000)("rejecting a *per se* exception to the "knock and announce" rule for narcotics cases partly because "the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others," thus allowing the exception to swallow the rule").

To be sure, under the current law surrounding vehicles, there has been a slow but concerted erosion of any privacy rights in automobiles. See, *Wyoming v. Houghton*, 526 U.S. 295 (1999)(passenger has no privacy rights in his effects); *Chambers v. Maroney*, 399 U.S. 42 (1970)(the search was valid, despite the fact that once the car was at the station-house the police could easily have gotten a search warrant); *Texas v. White*, 423 U.S. 67 (1975) (same); *Florida v. White*, 526 U.S. 559

(1999)(police have a right to impound the car after arrest and search it without a warrant even where they had advance notice and could easily have gotten a search warrant before the entire episode); *United States v. Ross*, 456 U.S. 798 (1982) and *California v. Carney*, 471 U.S. 386 (1985)(where the police have probable cause to believe that a car is being used to transport contraband, and they stop it, they may conduct a warrantless search not only of the car but of closed containers in the car. They may do this on the scene, without even impounding the car (as they have to do in the above "search at the station-house after arrest" scenario); *California v. Acevedo*, 500 U.S. 565 (1991)(even if the police's probable cause relates solely to a closed container inside the car, not to the car itself, the police may stop the car and seize and open the container, all without a warrant); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)(on a stop based on reasonable suspicion, an officer may require the driver to exit the vehicle without specifically showing that requiring such an action was necessary for the officer's protection); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (warrantless stop and search of auto by roving patrol near border). See, generally, *Acevedo*, 500 U.S. at 582-84 (Scalia, J)(outlining the 20+ exceptions to warrantless searches).

"Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States v. Jeffers*, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). To this end, the new zone based-approach comports with the general rules of warrants and provides a workable rule for law enforcement.

Because *Chimel* expressly limited warrantless searches to being incident to a lawful arrest, and that

Belton only narrowly extended *Chimel* to the passenger area of a vehicle to effectuate the *Chimel* policies, whether the occupant exited voluntarily or by police instigation is irrelevant. Presumptively a search is only permitted under *Belton* if the *Chimel* policies are satisfied. Because the *Chimel* factors only implicate the spatial and temporal relationship of the arrestee to his vehicle, a very workable rule can be defined.

Somewhere along the way, the *Carroll* case and its statutory search for contraband in vehicles and *dicta* from that case have contorted the Fourth Amendment's applicability to vehicles. This pernicious effect has had profound implications on vehicle operators or passengers to the extent that almost nobody has any reasonable privacy rights in a vehicle. In *Boyd v. United States*, 116 U.S. 616, 635 (1886), the Court noted (in an era before widespread vehicle use):

> though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

III. Application Of The Zone Based Approach To Thornton

In this case, the facts found by the trial court, affirmed on appeal, and not challenged here all indicate that Mr. Thornton: (a) exited the car on his own; (b) was arrested while Mr. Thornton was standing beside his car; (c) was placed into custody in the squad car; and (d) admitted he was in "close proximity" to his car. *Thornton*, 325 F.3d 189, 196 (4th Cir. 2003). It is unclear from the record whether the "close proximity" of Thornton satisfies *Chimel's* spatial test. It is unclear whether this finding is a finding of fact or conclusion of law warranting deferential or *de novo* review respectively by this Court. Furthermore, if the zone-based approach is adopted, then this Court may affirm the conviction if "close proximity" brings Mr. Thornton within the zone. Alternatively, the Court ought to remand the case to the district court for further examination consistent with the zone-based approach to determine if he was in the zone. It may occur on further examination that under the zone-based approach, his facts satisfy Scenario 3 in that he voluntarily exited the car and was in the zone at the time of his arrest. As such, his conviction ought to be affirmed as the search was Constitutionally permissible under *Chimel*, as modified by *Belton*. On the other hand, the facts may indicate that he was outside the zone and thus suppression was Constitutionally required.

CONCLUSION

For these reasons, this Court ought to adopt a zone based approach that gives fidelity to *Chimel-Belton* and limits the number of exceptions created under the Fourth Amendment.

Respectfully submitted,

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